

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MICHAEL HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51274

KEVIN MICHAEL HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51275

KEVIN MICHAEL HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51276

FILED

JAN 08 2009

THOMAS K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from an order of the district court denying appellant Kevin Michael Harris's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On July 1, 2003, the district court convicted Harris, pursuant to guilty pleas, of obtaining and/or using the personal identification of another in district court case number CR02-0032; of burglary and grand larceny of a motor vehicle in district court case number CR03-1057; and of uttering a forged instrument in district court case number CR03-1058. The district court sentenced Harris to serve consecutive terms totaling 104 to 372 months in the Nevada State Prison.

09-00554

On August 1, 2007, Harris filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist Harris. The district court found that Harris had demonstrated good cause to excuse his untimely petition after conducting an evidentiary hearing on the issue. On February 13, 2008, the district court denied Harris's petition after conducting an evidentiary hearing on whether his counsel was ineffective for failing to present mitigating evidence at sentencing. This appeal followed.

First, Harris argues that the district court erred by finding that his counsel was not ineffective at sentencing for failing to introduce testimony from his parents and his military records. Specifically, he claims that the district court abused its discretion when it found that the testimony from Harris's parents and his military records were not sufficiently persuasive to have affected his sentence.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the result of the proceeding unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Factual findings of the district court that are

supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

We conclude that the district court's finding that Harris's counsel was not ineffective was supported by substantial evidence. At the evidentiary hearing, Harris's counsel testified that she had a general discussion with Harris about the presentation of mitigation evidence, however, she did not specifically discuss seeking testimony from his parents. Harris's trial counsel also testified that she was aware of his service in the Navy and saw that it was noted on the presentence investigation report. Thus, she did not feel it was necessary to introduce his records in court. In addition, Harris introduced his military records during the evidentiary hearing, which indicated that he served for 19 days in the Navy in 2001 until he was medically discharged, and his parents testified that he was a generally law-abiding person until he started doing drugs. The district court found that Harris failed to meet his burden of demonstrating that his trial counsel failed to ask about mitigating evidence or that Harris was unaware of his right to present mitigating evidence and that Harris failed to demonstrate that his sentence would have been different, in light of his numerous felony convictions, had the alleged mitigating evidence been presented at sentencing. Substantial evidence supports the district court's determination. State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (citing State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658-59 (2002)). Therefore, the district court did not err in denying this claim.

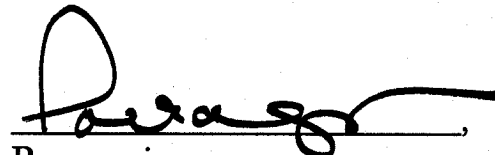
Second, Harris argues that the sentencing court erred in relying on his presentence investigation report, which stated that he had

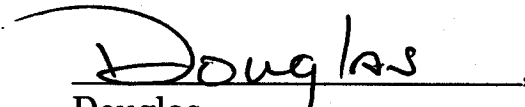
only spent five years in prison in California in a case that was related to the instant offense.

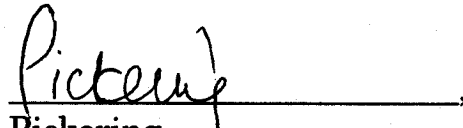
This ground for relief was not raised in Harris's post-conviction petition for a writ of habeas corpus or argued in the district court below. This court will not consider claims for relief that were not raised in the original post-conviction petition for habeas corpus or considered by the district court. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Therefore, we decline to consider the argument.

For the reasons stated in this order, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre J.


Douglas J.


Pickering J.

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk